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Office-Supreme Court, U. S.
FILED
JUL 25 1951
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 202

GOVERNMENT SERVICES, INC., *Petitioner,*

v.

DISTRICT OF COLUMBIA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

DISTRICT OF COLUMBIA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Petitioner, Government Services, Inc., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on April 26, 1951, affirming the decisions of the Board of Tax Appeals for the District of Columbia.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals for the District of Columbia (R. 27) is not officially reported. The opinion of the court of appeals (R. 124) is not officially reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was entered April 26, 1951. (R. 127) The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

Two questions are presented:

1. Whether petitioner corporation, organized under the charitable corporation laws of the District of Columbia and none of whose earnings inure to any private individual or stockholder, is exempt under appropriate statutory provisions from District of Columbia franchise, motor vehicle and personal property taxes as a corporation organized and operated exclusively for charitable purposes where the corporation's sole activity is providing meals and other services to federal government employees upon government property at the direction of and under agreement with the federal government.

2. Whether petitioner corporation, whose controlling membership is limited to certain officials of the federal government, is exempt under appropriate statutory provisions from District of Columbia franchise taxes as a civic league or organization not organized for profit but operated exclusively for the promotion of social welfare.

STATUTES INVOLVED.

D. C. Code (1940 Supp. VII) § 47-1554, 61 Stat. 334 (1947):

> "*Exempt organizations.*
>
> The following organizations shall be exempt from taxation under this Article: * * *
>
> (d) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational

purposes, or for the prevention of cruelty to children or animals, to a substantial extent within the District, no part of the net earnings of which inures to the benefit of any private individual or shareholder, and no part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation."

* * *

"(f) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted principally to charitable, educational, or recreational purposes within the District."

D. C. Code (1940) § 47-1208, 32 Stat. 620 (1902):

"*Personal property exempt from taxation.*

The following personal property shall be exempt from taxation.

First. The personal property of all library, benevolent, charitable, and scientific institutions incorporated under the laws of the United States or of the District of Columbia and not conducted for private gain."

STATEMENT.

Two issues are presented: (1) Whether petitioner is exempt under the provisions of the foregoing statutes from the payment of District of Columbia franchise[1] and personal property taxes as a "Corporation(s) * * * organized and operated exclusively for * * * charitable * * *

[1] The District of Columbia imposes no franchise tax comparable to the taxes measured by capital or capital stock in many states but does impose a franchise tax measured by net income. D. C. Code (1940 Supp. VII) § 47-1551 et seq. The tax is, therefore, in effect a corporate income tax.

purposes"; and (2) Whether petitioner is exempt from the payment of District of Columbia franchise taxes as a "Civic league(s) or organization(s) not organized for profit but operated exclusively for the promotion of social welfare * * * " While other provisions of the exempting statutes impose additional requirements for exemption, no question was raised as to these provisions in the court below. The issues are, therefore, limited to those stated.

Petitioner was organized and incorporated in 1927 as a charitable organization under appropriate provisions of the District of Columbia Code (R. 86).[1] Its principal activity then, as now, was providing low cost meals and other services to federal government employees in the District of Columbia at the direction of and under agreement with the federal government. Thereafter, and until this case with respect to the tax year 1948, it was exempted by the District of Columbia as a charitable corporation from the payment of franchise and personal property taxes. This exemption arose first through a ruling of the Corporation Counsel of the District, though subsequently, for the tax year 1939 the District challenged petitioner's exemption status and petitioner appealed to the District Board of Tax Appeals, which, after hearing, found petitioner exempt as a charitable corporation (R. 31).

Nevertheless, the District again for the tax year 1948 made assessments against petitioner for franchise and personal property taxes and, in addition, for personal property taxes for 1949. Petitioner paid the taxes under protest and appealed from the assessments to the District of Columbia Board of Tax Appeals[2] (R. 2 et seq.). The appeals were heard and the Board affirmed the assessments (R. 16). Thereafter petitioner filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, which, after argument, affirmed the decisions of the Board of Tax Appeals (R. 127).

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[1] D. C. Code (1940) §§ 29-601, 602.

[2] D. C. Code (1940) §§ 47-1531 and 47-2403.

Petitioner developed from an informal association of government officials, who, shortly after World War I, recognized that certain service needs were not then being filled by existing governmental or private enterprises (R. 38). Thereafter petitioner was organized under District Charitable Corporation law "(a) To operate cafeterias and newsstands in Federal buildings for Federal employees, to render first aid in case of sickness or accident, to assist government employees in cases of emergency or distress along recognized lines of welfare work, to conduct tourist camps, bathing pools, and to provide lunch and refreshment stands and recreational facilities * * * for the health, safety and general welfare of government employees * * * (b) In the conduct of said business, the charges to be made as low as practicable to safely maintain the credit required for its operation * * * no part of the profits to inure, in any event, to private gain * * * " (R. 86).

Petitioner possesses legal capacities but has no stock or shareholders and no individual has any capital investment in petitioner. Upon dissolution proceeds are to be paid over to the United States (R. 91).

Petitioner has various classes of membership, but active members, who alone may elect the Board of Trustees, are restricted to "the signers of the Certificate of Incorporation and any official officer or employee in good standing and in the service of the United States * * * or of the District of Columbia, whose grade is equal to or higher than Chief Clerk, or Chief of Section, Division or Bureau." (R. 96).

The Board exercises the usual functions of establishing corporate policy and supervision and control of management in the general activities of the corporation.

Petitioner has no activity other than those performed under agreement with the federal government and its agencies. Such activities are undertaken only after request by the government and are upon government property (R. 40).

The first and principal written agreement between petitioner and the federal government was executed in 1927 and was in effect during the tax years in question. Under this agreement petitioner contracted with the Director of Public Buildings and Grounds of the National Capital to operate a number of cafeterias for federal employees in the District and also to operate recreational activities upon federal properties in the District of Columbia with an equal division of profits between petitioner and the United States (R. 82).

Under this and other agreements petitioner in 1948 operated 41 cafeterias and lunch counters and 30 snack bars on federal property in the District. This operation comprises the major part of petitioner's activities.

Prices charged by petitioner are controlled by the United States (R. 84). In establishing prices it has been attempted, with marked success, to realize minimal profits in excess of costs in order to provide the best service at lowest prices. For example, during the period 1932 to 1948 the average profit per tray has been only $.002225 (R. 118). At times the margin of profit has been so narrow that petitioner has operated at a loss because of increased activities requested by the federal government. On the basis of volume, had petitioner been activated by ordinary profit motives large profits could have been made.

In the year 1948 petitioner served in excess of twenty-one million trays and had a net loss of $.002428 per tray (R. 118). The increase in Government activities in the Washington area during the War resulted in petitioner's being called upon to furnish its services to a vastly increased number of patrons. Although petitioner's eating facilities served 8,553,471 patrons in 1939, the War activities boosted the number to 41,952,335 in 1944 (R. 118). During the post-war period operations were curtailed as activities were deactivated so that only 21,230,198 patrons were served during 1948, and during the period 1946-1948 petitioner incurred net losses aggregating $312,597.52 (R.

118). During this period, when many of the activities undertaken by petitioner during the War were being deactivated, petitioner continued rendering the necessary service at a loss as long as the governmental unit desired. Indeed, petitioner has voluntarily operated at a loss a number of its units which were incapable of being self sustaining merely because the government requested petitioner to do so (R. 70, 116).

In addition to its cafeteria and snack bar business petitioner by contract with the National Park Service operates a number of heterogeneous activities such as swimming pools and tennis courts in the parks in the District of Columbia.

With respect to disposition of its profits, under its contracts petitioner makes large payments to the government. During its history petitioner has paid under its master contracts for operating units $1,439,590.62 and it has paid $195,070.99 for those units it operates on an individual basis.

It has been the policy of petitioner to make donations to the welfare societies of the various government departments in which it operates (R. 60). These societies are tax exempt charitable associations. Customarily, this donation has been in the amount of 10% of petitioner's profit realized from the particular unit during the calendar year. While the donation is contingent upon the profit of the individual unit, a loss in one year has no effect upon the computation of the donation in a subsequent year (R. 70). In addition, petitioner makes donations annually to a number of other organized charities (R. 51).

The greater part of the income remaining after payments to the government and its various donations is channeled back to improving the services rendered through reinvestment in its various facilities. The effect to such a policy is to relieve the burden of government providing such a service which, unless performed by petitioner, would have to be done by the government itself.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that petitioner is not exempt from District franchise and personal property taxes as a charitable corporation lessening the burdens of the federal government.

2. In holding that the charitable corporation exemption provisions of pertinent District of Columbia statutes relate only to exemptions for corporations for the relief of the poor.

3. In holding that petitioner is not exempt from District of Columbia franchise taxes as a civic league operated exclusively for social welfare.

REASONS FOR GRANTING THE WRIT.

The determination of the issues involved in this case requires construction of District of Columbia statutes exempting certain corporations from the payment of District franchise and personal property taxes. The decision of the court below, therefore, is technically an interpretation of a local statute. Nevertheless, its interpretation has broad implications in the field of corporate exemptions under the federal Internal Revenue Code since the exempting provisions here in issue and those of the federal Internal Revenue Code are identical.[1] Therefore, and since, in fact, the local statute was copied from the Internal Revenue Code, the decision of the court below is not merely the determination of a local tax matter having no general interest beyond the confines of its jurisdiction,[2] but is, on the contrary, an important and, it is urged, novel decision and precedent having wide effects in a major field of federal income tax law.

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[1] Int. Rev. Code §§ 101(6), 101(8).

[2] And was so treated by both the District and the court below (R. 125). Brief for District of Columbia in the court below, pp. 8-9.

I.

The Decision of the Court Below with Respect to Petitioner's Claim for Exemption as a Charitable Corporation is in Conflict with Decisions of This Court and with a Decision of the Court of Appeals for the Second Circuit.

Petitioner based its claim for exemption from District franchise and personal property taxes on the ground that it was organized and operated solely for the purpose of lessening the burdens of the federal government which the government could itself assume only with great inconvenience.

The District Board of Tax Appeals decided that such a purpose and such a function did not fall within the tax definition of "charitable", since that term in the exempting statute meant only relief for the poor. The court below squarely upheld this conclusion of the Board.

While it is true that relief of the poor is unquestionably charitable within the meaning of the statute, it is by no means the sole charitable activity entitled to exemption. Historically and traditionally charitable institutions may perform any number of charitable functions which qualify them as charities under general law[1] and, by analogy, as a matter of tax law.

The interpretation of the word "charitable" as used in tax statutes was necessarily borrowed from the interpretation of that term in general law. Congress clearly had this broad definition in mind when it used the term in this statute. Indeed, the court below in construing a tax exemp-

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[1] As a matter of the broad definition of the term as used in general law this Court in *Ould* v. *Washington Hospital* reaffirmed the classic definition of Mr. Binney in the report of *Vidal* v. *Girard's Executors*, 2 How. 127 (U. S. 1844):

> "Whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish." *Ould* v. *Washington Hospital*, 95 U. S. 303, 311 (1877).

tion statute using identical language in an earlier case came to this precise conclusion.

> "That Congress had in mind these broader definitions is confirmed by the words used in the Act, for by its terms it embraces religious, charitable, scientific, literary, or educational corporations, thus including within the exemption clause every nonprofit organization designed and operating for the benefit and enlightenment of the community, the State, or the Nation—in short, to apply the exemption to those organizations commonly designated charitable in the law of trusts. Consequently, we may properly draw analogy from the trust cases." *International Reform Federation* v. *District Unemployment Compensation Board,* 76 App. D. C. 282, 284, 131 F. 2d 337, 339 (1942).

Again the court below in another earlier case found estate tax exemptions under the same language for a corporation whose sole function was opposition to the practice of vivisection. Justice Groner there found that:

> "Congress did not include a definition of the term 'charitable' as used in the act. In the absence of a definition, it is our duty to give the word its ordinary meaning." *Pennsylvania Company for Insurance on Lives* v. *Helvering,* 62 App. D. C. 254, 257, 66 F. 2d 284, 287 (1933).

Such has been the unquestioned interpretation in other jurisdictions. *In re Kennedy's Estate,* 240 App. Div. 20, 269 N. Y. S. 136 (1934); affirmed 264 N. Y. 691, 191 N. E. 629. *Matter of Beekman's Estate,* 232 N. Y. 365, 134 N. E. 183.

If it be assumed, as it must, that Congress intended a definition of the term "charitable" in the exempting statute as that term is understood in general law, it is clear that as a matter of general law lessening the burdens of government is considered a fundamental charitable purpose. For example:

> "Charitable purposes include: * * * (d) the promotion of health; (e) governmental or municipal pur-

poses; (f) other purposes aforementioned and advantages beneficial to the community." RESTATEMENT, TRUSTS § 368 (1935).

"A trust for the purpose of supplying a community with facilities ordinarily furnished at the expense of taxpayers is charitable." BOGERT ON TRUSTS, § 373 (1935).

Further authorities on this fundamental proposition, which apparently has not been contraverted since its inception, have been assembled in a number of instances.[1]

Nevertheless, the court below, despite the obvious inconsistency with its own prior decisions, was content to dismiss this contention as "the sweeping phrases of court opinions * * * which can not be translated into definitions of tax exemption by a mere application of their phrases".[2]

Having disposed of this fundamental and hitherto uncontested proposition in this casual language, the court below, without reference to authority, concluded that petitioner was not entitled to tax exemption since local public utilities, newspapers and cut rate stores are not exempt, although they too, in the court's opinion, lessen the burden of government.

Analysis of these tenuous analogies becomes unnecessary in view of the distinction established by this Court in the leading case on this subject.

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[1] See, further, Note, Provision for Public Utility for Convenience Commonly Supplied at Expense of Taxpayers as Subject of Valid Charitable Trusts, 50 A.L.R. 593 (1927), citing numerous cases sustaining this proposition, and ZOLLMAN, AMERICAN LAW OF CHARITIES, § 326 (1924).

[2] Note also that the Court disregarded the principle that tax exemption provisions are to be strictly construed does not apply to the charitable exemption. *Bohemian Gymnastic Assn. Sokol of City of N. Y.* v. *Higgins*, 147 F. 2d 774 (2nd Cir. 1945); *United States* v. *Proprietors of Social Law Library*, 102 F. 2d 481 (1st Cir. 1939); *Harrison* v. *Barker Annuity Fund*, 90 F. 2d 286 (7th Cir. 1937).

In *Trinidad* v. *Sagrada Orden*, 263 U. S. 578 (1924), in construing a statute using identical language where the tax exemption status of a corporation trading in wine and chocolate whose proceeds went to a recognized charity was in question, this Court, through Mr. Justice Van Devanter, held that:

> "Whether the contention is well taken turns primarily on the meaning of the excepting clause, before quoted from the taxing act. Two matters apparent on the face of the clause go far towards settling its meaning. First, it recognizes that a corporation may be organized and operated exclusively for religious, scientific, or educational purposes and *yet have a net income. Next, it says nothing about the source of the income, but makes the destination the ultimate test of the exemption.*" (Italics supplied) 263 U. S. 578, at 581.

If destination is the test, as this Court holds, it is conceded that the destination of all of petitioner's income is to donations to recognized charities, improvement to its facilities for services to be rendered to federal government employees, and, lastly, for the presentation of funds to the federal government.

If it be assumed that the activities of operating a street car company, or a book store, or a newspaper, do indeed, lessen the burden of government, it must also be conceded the basic reason for their existence is the private and personal gain of their individual owners, who are the ultimate destination of income. The court below, then, implicitly takes issue with the principle of the *Sagrada Orden* case in their apparent conclusion that a charity with a net income may not be exempt and that a similar vice attaches to an earned surplus.

Moreover, the decision of the court below is not only in conflict with the *Sagrada Orden* case, but is in conflict with the leading case in the Second Circuit. In *Roche's Beach Inc.* v. *Commissioner of Internal Revenue*, 96 F. 2d 776 (2nd Cir. 1938) it was held that a corporation operating a bath-

ing beach whose proceeds were turned over to a recognized charity was exempt from income tax under the charitable corporation exemption provision of the Internal Revenue Code. The court there, through Judge Swan, held that:

> "This does not mean that to come within the exemption a corporation may not conduct business activities for profit. The destination of the income is more significant than its source." at p. 778.
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> • • •
>
> "No reason is apparent to us why Congress should wish to deny exemption to a corporation organized and operated exclusively to feed a charitable purpose when it undoubtedly grants it if the corporation itself administers the charity. We think the language is adequate to describe both types." at p. 779.

Furthermore, the conflict on this general issue is not merely confined to these two circuits. In a recent case the Fourth Circuit Court of Appeals held[1] that a taxpayer organized to operate a canteen refreshment service and other sales concessions for the convenience of certain mill employees was not entitled to charitable exemption from social security taxes as "a corporation • • • organized and operated exclusively for religious, charitable, scientific, literary or educational purposes" under language identical to that in the instant case. There, too, the decision of the Second Circuit in the *Roche's Beach* case was urged upon the court. In answer to this contention the cleavage between the circuits was expressly recognized by Judge Dobie as he writes:

> "The majority opinion in Roche's Beach, Inc., 96 F. (2d) 776 (supra) (C. C. A. 2, opinion by Circuit Judge Swan) holds squarely in favor of taxpayer. *The force of that case, however, is greatly weakened by the strong dissent of Judge Learned Hand, with which we heartily*

[1] U. S. v. Community Services, Inc., C. C. A., 4th May 5, 1951 P-H Federal Tax Service Vol. 4 1951, ¶ 72,402.

agree, and from which we quote * * * " (Italics supplied)

The growing rift between conflicting circuits[1] produce unnecessary uncertainties imperiling not only the future administration of charitable institutions, but also the administration of important federal tax statutes. As such, it seems clearly an urgent subject for prompt determination by this Court.

Finally, it should be pointed out that the opinion of the court below expressly espouses tax philosophies into which this Court may wish to inquire. In search of support for its conclusions other than tenuous commercial analogies the court below turned *obiter* to the broader field of tax philosophy. It concluded that petitioner's profits, though to be used to lessen the burdens of federal government and for ultimate presentation to that government, were not only not exempt, but an ideal subject of taxation. Such a view would be understandable in the local assessor of taxes. But in the court below it seems to unduly highlight and approve the competition for revenues which the subordinate District of Columbia has apparently undertaken with its sovereign.

In any event, the Court here attempts to substitute an academic speculation for lack of authority and precedent.

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[1] Moreoxer, the Tax Court and the Third Circuit are now involved in the matter. "Though the petitioner suggests that the policy to tax commercially derived income to all charities was not made a part of the Federal tax structure under section 301, 302 and 303 of the Revenue Act of 1950, approved after the Mueller decision, we do not find in that Act grounds for the inference seen by petitioner. Since the filing of briefs in this case, the United States Court of Appeals for the Third Circuit, reversed the Mueller case (....Fed. (2d)...., June 20, 1951 [51-1 USTC ¶ 9360]). With all due respect to that court, we adhere to the conclusions expressed by us in that case, and cited in *Community Services, Inc., supra.*"
Joseph B. Eastman Corp. 16 TC.... No. 187, Promulgated June 29, 1951.

The court's predilections as to proper sources of revenue are no substitute for determination of congressional intent. Certainly, the interpretation of "charitable" as a general legal phrase became imbedded in the statute at its passage. If it is to be changed, the remedy is by legislation and not abstract philosophical speculations.

II.

The Decision of the Court Below with Respect to Petitioner's Claim for Exemption as a Civic League is in Conflict with a Decision by the Sixth Circuit and with Administrative Determinations.

In addition to its claim for exemption as a charitable corporation petitioner claimed, alternatively, exemption from the franchise tax as a civic league or organization under § 47-1554 (f) of the District of Columbia Code. The court rejected this claim on the ground that under the circumstances the activities of petitioner were not "social welfare" in the tax exemption sense.

This conclusion seems clearly in conflict with the decision of the Sixth Circuit in *United States* v. *Pickwick Electric Membership Corp.*, 158 F. 2d 272 (6th Cir. 1946), where the taxpayer was ruled exempt from the federal income tax under the substantially identical terms of section 101 (8) of the Internal Revenue Code.[1]

There the taxpayer was organized by certain residents to obtain electricity for the rural community in which they lived. It benefited many unincorporated community centers, rural districts, schools and towns by its services. By its purchase from a preexisting power company of its dis-

[1] "(8) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes;"

tribution system the taxpayer acquired and served approximately 1,600 new consumers who had not previously been members of the cooperative. The cooperative served some consumers who were not members and charged them rates approximately the same as was charged by the private power company whose transmission system had been acquired by the cooperative electric company, and these rates were higher than the cooperative charged its own members.

In determining that the taxpayer was exempt under Sec. 101 (8), the Sixth Circuit held that:

> "It is not necessary that its net earnings be devoted exclusively to charitable, education or recreational purposes, as that provision of the subsection pertains only to local associations of employees, and is not applicable to civic leagues or organizations such as the appellee. *Hanover Imp. Soc.* v. *Gagne,* 1 Cir., 92 F. 2d 888.
>
> "No serious contention appears to be made that appellee is not a civic league or organization. 'Civic' is defined as pertaining to a city or a citizen; relating to the community. A civic league or organization embodies the idea of citizens of a community cooperating to promote the common good and general welfare of people of the community. It seems clear that appellee falls within such a classification. *Garden Homes Co.* v. *Commissioner,* 7 Cir., 64 F. 2d 593; *Debs Memorial Radio Fund* v. *Commissioner,* 2 Cir., 148 F. 2d 948, 951; *Amalgamated Housing Corporation* v. *Commissioner,* 37 B. T. A. 817, 825 [affirmed on order, 2 Cir., 108 F. 2d 1010]." at p. 276.

In circumstances similar to those of petitioner the court found that "It was sound business judgment to establish rates that would not result in an operating loss and the resulting margin of safety, allocated in advance to the cooperative purpose of the organization, is not the profit motive contemplated by the statute." (Id. at 276) Thus, the fact that some profit was realized through the sales to private individuals other than members was not controlling since financial gain was not the end to which the transactions were directed.

Obviously, it is impossible to conclude that the function of supplying electrical energy to both members and non-members of a cooperative fills a higher social need than that of providing inexpensive meals to federal employees who could otherwise obtain them only at additional expense to themselves and time loss to the government.

Moreover, under a substantially identical section of the Internal Revenue Code petitioner has been found exempted from the payment of federal income taxes by the Commissioner of Internal Revenue. The following language in the Commissioner's letter exempting petitioner seems pertinent in this connection:

> "The substantial reserve which has been built up from the profits ($391,819.25) has been invested in the equipment and supplies necessary for the operation of the concessions, or is held for the purpose of paying for equipment purchased or to be purchased for the operation of additional concessions contemplated or decided upon. Except for such necessary reserves, all net income is distributed to the welfare organizations of the employees of the various public buildings in which the concessions are operated, or is devoted to the numerous purely welfare activities sponsored by the association. None of the profit can inure to the benefit of any member of your association.
>
> "Based upon the foregoing, it is held that your association is entitled to exemption under the provisions of section 101 (8) of the Revenue Act of 1936 and the corresponding provisions of prior revenue acts. It is not, therefore, required to file returns of income for 1937 and prior years. Inasmuch as section 101 (8) of the Revenue Act of 1938 is similar to section 101 (8) of the Revenue Act of 1936, returns for subsequent years will not be required so long as there is no change in the form of organization, the purposes or method of operation." (R. 122-123)

It is concluded that the decision of the court below not only conflicts with the ruling of the Bureau of Internal Revenue, but, and more importantly, with the highly analogous *Pickwick* case in the Sixth Circuit.

III.

The Question Involved is of Great and Continuing Importance.

No aspect in the recent administration of tax laws has incurred more general interest than the problems attendant upon tax exemptions of charitable organizations.[1] Mounting costs of government, the diminution of other sources of revenue, and suggestions of abuse by tax exempt organizations have induced officials of government and administrators of tax laws to increasing reexamination of charitable organizations as a proper source for additional sources of revenue. The result has been, as the vast amount of literature on the subject so clearly illustrates, one of confusion, uncertainty and lack of definition.

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[1] For some recent examples see Note, *Use of Charitable Foundation for Avoidance of Income Taxes*, 34 Va. L. Rev. 182 (1948); Cary. *Corporate Financing Through Sale and Lease Back of Property*, 62 Harv. L. Rev. 1 (1948); Cary, *Tax Aspects of Sale* and *Lease Back of Property*, Proc. of N. Y. U. 7th Ann. Inst. on Fed. Taxation (1949); Jenks, *The Use and Misuse of Section 101(6)*, Proc. N. Y. U. Inst. on Fed. Taxation (1949); Polisher, *Maximum Benefits from Charitable Gifts*, Proc. N. Y. U. Inst. on Fed. Taxation (1949); Casey, *Use of the Foundation in Your Estate Planning*, Proc. N. Y. U. Inst. on Fed. Taxation (1948); *How to Have Your Own Foundation*, FORTUNE, August 1947; Ross, *A Primer on Charitible Organizations and the Estate Tax*, Taxes, Feb. 1949; Eaton, *Charitable Foundations and Related Matters Under the 1950 Revenue Act*, 37 Va. L. Rev. 1 (1951); Eaton, *Charitable Foundations, Tax Avoidance and Business Expediency*, 35 Va. L. Rev. 809 (1949). Blodgett, *Charities in Business*, Proc. N. Y. U. *Inst. on Fed. Taxation* (1950); Seale, *What is New Regarding Sales to Charities and Other Exemption Organizations?*, Proc. N. Y. U. Inst. on Fed. Taxation (1950); Latcham, *Private Charitable Foundations: Some Tax and Policy Implications*, 98 U. of Pa. L. Rev. 617 (1950); Note, *Legislation: Taxation: Charitable Exemptions and Business Profits: IRC § 101(6)*, 35 Cornell L. Q. 922 (1950) Blodgett, *Tax Status of Business Activities of Charities Prior to the Revenue Act of 1950*, Proc. N. Y. U. Inst. on Fed. Taxation (1951).

In addition to the confusion engendered by conflicting decisions of courts, administrative bodies, and authorities, at least part of the difficulty must be ascribed to this Court. The last decision by this Court on this subject was in the *Sagrada Orden* case in 1924. Since that decision by this Court enormous developments in the field have created a multiplicity of problems requiring clarification and definition by this Court.

The net result of the demand for additional revenues from charities by tax authorities and supported by courts has effected new concepts of tax exemption which so narrow the field within which charities may work as to imperil their future existence. Eventually this attitude will cause the atrophy of legitimate charities by narrowing, perhaps finally by closing off entirely their sources of revenues. This can only result in creating this additional problem for government. Certainly, it is highly questionable whether this is a form of social welfare that a government ought to undertake.

At a time when our social and political fabrics are under severe stresses by conflicting and foreign philosophies the necessity for governmental units to undertake additional charges as a result of the decline of charitable activities can have only adverse effects upon an already overburdened economy.

Clearly, there is no problem in tax law of greater significance and none requiring more thoughtful legal and social attention.

CONCLUSION.

It is submitted that the conflict with a decision of this Court, the conflict of circuits and the great general importance of the question involved requires that this petition for a writ of certiorari be granted.

Respectfully,

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FILED
AUG 21 1951
CHARLES ELMORE CROPL
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 202

GOVERNMENT SERVICES, INC., *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals for the District of Columbia (R. 27-32) is reported in The Corporation Tax Service, District of Columbia (C. C. H.), page 2503, par. 24-002. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 124-126) is reported in The Corporation Tax Service, *supra*, page 2526, par. 24-010.

GROUNDS OF JURISDICTION

Although the petitioner has made a jurisdictional statement apparently in compliance with Rule 38, par. 2, of this Court (Br., p. 2), it has not stated the grounds on which the jurisdiction of this Court is invoked as required by Rule 27, par. 2(c), of this Court.

COUNTER STATEMENT OF THE CASE

Petitioner's statement of the case consists (1) in part of certain selected portions of the evidence adduced before the Board of Tax Appeals and (2) in part of erroneous conclusions not supported by the findings of fact or the evidence.

It has been settled by this Court that findings of fact made by the Board of Tax Appeals must be treated as presumptively correct and must be accepted unless clearly wrong. *District of Columbia* v. *Pace,* 320 U. S. 698. Respondent has had certified to and filed in this Court a copy of petitioner's brief which was filed in the United States Court of Appeals for the District of Columbia Circuit. It will be seen therefrom that petitioner did not in its statement of the "questions presented", its "statement of points", or in its argument, attack the Board's findings of fact or attempt to show wherein any findings of fact or portion thereof was clearly erroneous. Instead of determining that any of the Board's findings were clearly erroneous the Court of Appeals agreed with the Board of Tax Appeals and affirmed its decisions (R. 126). In fact, petitioner stated in its brief filed with the Court of Appeals, under "summary of argument" (p. 14) that: "Since all the evidence was drawn from petitioner's records or the testimony of its officials, there is little dispute except as to legal conclusions to be drawn from these facts."

Notwithstanding the foregoing, petitioner has completely ignored the Board's findings of fact (R. 17-27) in making

its statement of the case in this Court and has not presented any question with respect to such findings. Under the circumstances it is believed that petitioner cannot ignore the Board's findings of fact but is bound thereby. *District of Columbia* v. *Pace, supra.*

Examples of erroneous matter contained in petitioner's brief filed in this Court are:

(1) It is stated on p. 4 that petitioner was organized and incorporated in 1927 as a charitable organization. In Finding 2 (R. 18) the Board found: "The charter states that the incorporators thereof [petitioner] 'do hereby associate themselves for benevolent and charitable purposes *and for mutual improvement,*' * * *." (Emphasis supplied.) Petitioner was organized under the provisions of sub-chapter 3, Chapter XVIII of the 1901 Code of Law for the District of Columbia, 31 Stat. 1283, c. 854 (Title 29, Chap. 6, D. C. Code 1940) as the Board found (R. 18). Less than two years after enactment of said statutory provision the Court of Appeals said as to it that corporations could be organized thereunder for individual gain *or* for public uses or charitable and benevolent purposes. *United States ex rel. Chicago Business College* v. *Payne,* 20 App. D. C. 606, 614, 615. See also *Better Business Bureau of Washington, D. C.* v. *United States,* 79 U. S. App. D. C. 380, 148 F. 2d 14, affirmed 326 U. S. 279, involving a claimed exemption from social security taxation, the claimant having been incorporated under the same chapter of the District of Columbia Code referred to above (*Better Business Bureau of Washington, D. C.* v. *District Unemployment Compensation Board,* 34 A. 2d 614).

(2) On p. 6 petitioner states that the prices charged by it are controlled by the United States. But in the last paragraph of Finding 6 (R. 21) the Board found: "Petitioner was given the exclusive right to operate the activities and facilities covered by the agreement, but all fees and prices charged were to be subject to the approval of the Director

[of Public Buildings and Public Parks of the National Capital]." The agreement referred to was a "concessionaire" contract between petitioner and the Director, acting for the United States (R. 82-85).

(3) On p. 7 petitioner states that it has been its policy to make donations to the welfare societies of various government departments in which it operates, which societies "are tax exempt charitable associations", and that, customarily, such donations have been in the amount of 10% of petitioner's profit realized from the particular unit during the calendar year. There is no finding of fact nor any evidence in the record on which to base the statement that the societies referred to are "tax exempt charitable associations"; nor is it a fact that the alleged donations to such associations amounted, customarily, to 10% of petitioner's profit realized from the particular unit. The record referred to in support of the statement (R. 70) as well as the Board's finding of fact (R. 23) clearly show that the amount paid to each was 5% of the gross profit. In Finding 10 the Board found (R. 23): "10. In 1948 petitioner contributed to approximately 15 welfare and recreational organizations in various Government establishments. These contributions were equal to 5 per cent of the gross profit of the particular installation. If a particular installation was operated at a loss, the welfare and recreational organization of that Government establishment received nothing from that source, although other installations of petitioner in other establishments showed a profit; on the other hand, each year was carried separately for the purpose of determining the amount of the contribution, and there was no deduction during profitable years for losses in unprofitable years at the particular installation involved."

Petitioner also states (p. 7) that it makes donations annually to a number of "other organized charities", referring to page 51 of the Record. The record shows that the

only contributions made by petitioner during 1948 and 1949 to recognized charities were (R. 62):

Community Chest Federation	$1,000 each year
American Red Cross	$100 or $150 each year
Police Boys Club	$100 each year

(4) On p. 7 petitioner states with respect to dispositions of its profits that it makes large payments to the Government. But petitioner does not state that such payments have been, as the Board found in Finding 11 (R. 23), *in lieu of rent* [and see the Board's opinion on this at R. 29]. Petitioner further states (p. 7) that the greater part of the income remaining after payments to the government and its various donations is channeled back to improving the services rendered through reinvestment in its various facilities and then erroneously concludes that the effect of such a policy is to relieve the burden of government. However, the fact is that from the time petitioner was incorporated to December 31, 1945, its operations resulted in a net profit and on that date petitioner had an earned surplus of $1,878,385.80 (R. 24, Finding 12). During the years 1946, 1947 and 1948 petitioner's operations resulted in losses and by December 31, 1948, the earned surplus had dwindled to $1,450,221.84, or a decrease of $428,163.96 (R. 24, Finding 12). Of this amount, $312,644.09 (73.02%) was lost through serving meals to Federal employees at less than cost, computed from figures contained in Petitioner's Exhibit No. 24 (R. 118), as follows:

Year	*Net Loss Per Tray*	*Number of Patrons*	*Amount of Loss*
1946	$—.006064	30,051,437	$182,231.91
1947	$—.003387	23,284,694	$ 78,865.26
1948	$—.002428	21,230,198	$ 51,546.92
		Total	$312,644.09

These findings and figures conclusively show that not only was there no net income for the years 1946, 1947 and 1948, but a large portion of petitioner's accumulated earnings was distributed to Federal employees by providing them meals at less than the cost of producing and serving them.

The Board found that some activities of petitioner were undertaken and operated at a loss, and were continued by petitioner at a loss (R. 22, Finding 8). As to these the Board said (R. 30): "The fact that petitioner undertook certain operations with little or no expectation of a profit, or even with the certainty of loss, does not change its character. It is to be remembered that petitioner had virtually a monopoly in the areas in which it operated. The conduct of losing operations under such circumstances is quite common, and is consistent with good business judgment, for the purpose of maintaining its privileged status,—in other words, to take the bad along with the good. The Government agencies involved would not be likely to permit it to operate the profitable enterprises unless it also took over the unprofitable or losing enterprises. Any other course would prevent the operation of such unprofitable or losing enterprises, as no other concessionaire could be induced to take over only the losing or unprofitable enterprises. As shown by the Findings of Fact, the over-all result of petitioner's activities has been profitable."

Petitioner has never been exempted from the payment of any Federal taxes on the basis that it is a "charitable" organization. It was exempted from Federal income taxes under a ruling by the Federal Commissioner of Internal Revenue in 1938 (R. 31, 119-123), but such exemption was granted under Section 101(8), I. R. C., applicable to civic leagues and local associations of employees. That ruling was based on petitioner's ex parte statement of its activities ten years before the year involved in the present proceeding, and it cannot be determined from the ruling (R. 119-123) whether petitioner was exempted as a "civic league" or as a "local association of employees". Under a ruling in

1936 it had been held that petitioner was not entitled to exemption from Federal income taxes (R. 119), and apparently the 1938 exemption has been lost and petitioner is now paying Federal income taxes (R. 57). In addition, petitioner has not been exempted from District unemployment compensation taxes, social security taxes and old age benefits taxes (R. 57, 58).

SUMMARY OF ARGUMENT

The statutes involved are limited in their operation to the District of Columbia and therefore this Court should not grant the petition for writ of certiorari.

The two questions presented in the petition are directed to the merits of whether petitioner is entitled to tax exemption as a "charitable" organization or a "civic league" under the applicable District statutes. These are the same questions which were presented to the Board of Tax Appeals and to the Court of Appeals, both of which were decided against petitioner in those tribunals. This Court has stated that it will not issue a writ of certiorari to give the defeated party another hearing.

Petitioner's argument is not confined to the questions presented but deals principally with alleged conflict of the decision of the Court below with the decisions of this Court and two of the Circuit Courts of Appeal. Consideration of the conflict question is precluded by Rule 38, par. 2 of this Court since it is not included in the question presented. Nevertheless, since the statutes involved are applicable to the District of Columbia only, there can not be any conflict of decisions. Cases relied upon as being in conflict with the decision of the Court below on the question of whether petitioner is a charitable organization were not cited to or relied upon before that Court and they are not in point. The two principal cases relied upon by petitioner as being in conflict with the decision of the Court below were clearly distinguished by the Board of Tax Appeals from the case of the petitioner.

The petition should be denied.

ARGUMENT

I

The Petition Should be Denied.

This Court has stated that it will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia Circuit which are based upon statutes limited in their operation to the District of Columbia. *District of Columbia* v. *Pace*, 320 U. S. 698, 702, *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285. The statutes involved in the case at bar are limited in their operation to the District of Columbia.

Petitioner asserts in its statement of the "REASONS FOR GRANTING THE WRIT" sought that although the decision of the court below is an interpretation of a local statute, its interpretation has broad implications in the field of corporate exemptions under the Federal Internal Revenue Code because the provisions of the statutes involved and those of the Federal Internal Revenue Code are "identical".

None of the statutory provisions involved is "identical" to any provision of the Federal Internal Revenue Code.

The present case is a consolidation of three cases which began in the Board of Tax Appeals for the District of Columbia (R. 2, 6, 11). In the two principal cases petitioner sought exemption from personal property taxation on its motor vehicles and other personal property. The personal property taxes assessed were for the fiscal year 1949 in the total amount of $18,805.24 (R. 2, 7). Par. 10, § 6 of the Act of July 1, 1902, 32 Stat. 620, ch. 1352 (§ 47-1208, D. C. Code 1940), under which the exemption was sought, exempts from taxation in the District of Columbia: "The personal property of all library, benevolent, charitable, and scientific institutions incorporated under the laws of the United States or of the District of Columbia and not conducted for private gain." There is no provision of the Federal Inter-

nal Revenue Code identical to the statutory provision just quoted because personal property is not taxed by the Federal Government.

In the third case petitioner sought exemption from a District of Columbia franchise tax which had been assessed for the fiscal year 1948 in the amount of $513.73 (R. 11). The franchise tax exemption was sought under the provisions of § 1(d), Title II of the District of Columbia Income and Franchise Tax Act of 1947 [hereafter referred to as the 1947 Act], 61 Stat. 334, ch. 258 (§ 47-1554(d), D. C. Code 1940, Supp. VII), applicable to religious, charitable, scientific, and other corporations, and § 1(f), Title II of said 1947 Act, applicable to civic leagues and local associations of employees (R. 28). These two provisions of law are almost, but not quite, identical to §§ 101(6) and 101(8) of the Internal Revenue Code, 53 Stat. 33 (§§ 101(6) and 101(8), Title 26, U. S. C. 1946). The differences between § 101(6), I. R. C., and § 1(d) of the District 1947 Act are that under the District section the favored organization must operate "to a substantial extent within the District", and that "no part" of the organization's activities may consist of carrying on propaganda or other attempts to influence legislation, whereas under § 101(6), I. R. C., the organization's activities in the latter respect may constitute "no substantial part" of its activities. The difference between § 1(f) of the District 1947 Act and § 101(8), I. R. C., is that under the District section the net earnings must be devoted "principally" to charitable, educational, or recreational purposes "within the District", whereas the Federal section provides that the net earnings shall be devoted "exclusively" to those purposes without specification of area. In making these changes the Congress, of course, was aware of the rule that exemptions from taxation are generally granted because the favored organization performs a function which otherwise must be performed by the government, and that since the United States is ubiquitous

and the District is not, the language of the Federal sections was too broad to protect the revenues of the District.

Rule 38, par. 2, of this Court provides that only the questions specifically brought forward by the petition for writ of certiorari will be considered. The two questions presented in the petition for the writ in this case are directed to the merits of whether petitioner is entitled to tax exemption as a "charitable" corporation or a "civic league" under the applicable statutes. These are the same questions which were presented to the Board of Tax Appeals (R. 27, 28) and the United States Court of Appeals for the District of Columbia Circuit,[1] both of which were decided against petitioner in those tribunals. Neither of the "QUESTIONS PRESENTED" in the petition presents a question whether the United States Court of Appeals for the District of Columbia Circuit has decided a question of general importance which, under Rule 38, par. 5(c), of this Court is the principal reason for urging this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. This Court has stated that cases of general importance are those involving principles the settlement of which is of importance to the public as distinguished from that of the parties, *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393, and not to give the defeated party another hearing, *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163.

Petitioner's argument in its petition for a writ of certiorari (pp. 9-19) is not confined to the questions presented but deals principally with alleged conflict of the decision of the court below with decisions of this Court and two of the circuit courts of appeal. In this connection it is noted that petitioner's brief is merged with its petition, contrary to Rule 27 and Rule 38, par. 2, of this Court, which is sufficient reason for denying the petition. *General Talking*

[1] See "Statement of Questions Presented" in petitioner's brief filed in the Court of Appeals, which has been filed in this Court.

Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 178. Inasmuch as the question whether there is conflict between the decision of the lower court and the decisions of this Court and certain other circuit courts of appeal has not been included in the "questions presented", this Court, by Rule 38, par. 2, has precluded consideration of it. Nevertheless, it is quite apparent that since the statutes involved in the present case are applicable to the District of Columbia only, although two provisions thereof are somewhat similar to provisions of Federal income tax law, there cannot be any conflict of decisions.

The principal case relied upon as being in conflict with an allegedly applicable decision of this court is *Trinidad* v. *Sagrada Orden*, 263 U. S. 578. However, petitioner did not rely on that case in the court below, as its brief (filed in this Court) will show. Apparently petitioner did not rely on the *Trinidad* case in the Court of Appeals because the Board of Tax Appeals, in deciding against petitioner, clearly distinguished that case from petitioner's case (R. 29). The case of *Roche's Beach, Inc.* v. *Commissioner*, 96 F. 2d 776 (CA 2, 1938), and the remaining cases cited in Point I of petitioner's brief which petitioner asserts are in conflict with the decision of the court below, likewise were not relied upon in the lower court. The *Roche's Beach* case is clearly not in point. The case of *United States* v. *Community Services, Inc.*, 189 F. 2d 421 (CA 4, 1951), cited by petitioner, is more in point; but that case, in which the court cited and distinguished many decisions of this Court and several decisions of the circuit courts of appeal, including the *Trinidad* and *Roche's Beach* cases, is against the petitioner and in accord with the decision of the lower court.

The remaining case which petitioner contends is in conflict with the decision of the lower court is *United States* v. *Pickwick Electric Membership Corp.*, 158 F. 2d 272 (CA 6, 1946). That case was the only case relied upon by peti-

tioner in the lower court in respect of its claim for tax exemption as a "civic league". Although the lower court did not cite or discuss the case in its opinion (R. 124-126), the Board of Tax Appeals clearly distinguished it from petitioner's case (R. 31). Apparently the Court of Appeals thought—and properly so—that was sufficient. As indicated by the Board of Tax Appeals, the *Pickwick* case is not in point. A case more nearly in point is *Automobile Club of St. Paul.* v. *Commissioner*, 12 T. C. 1152. In that case the petitioner, an automobile club, deriving its income principally from membership dues and the sale of insurance, and rendering to its membership various services, was denied exemption from Federal income taxation under Secs. 101(8) and 101(9), I. R. C. The court pointed out that petitioner's income largely inured to the direct benefit of its members by way of services of a commercial nature rendered to them by petitioner at lower rates than they would have to pay elsewhere and concluded that petitioner was not a tax-exempt corporation.

While not pertinent to the questions presented by petitioner in this case it seems advisable to comment on petitioner's conclusion in footnote 2 on page 11 of its brief. There petitioner comments that the lower court disregarded the principle that tax exemption provisions are to be strictly construed does not apply to the charitable exemption, citing decisions of the 1st, 2d and 7th Circuit Courts of Appeal. This conclusion is incorrect. In the case of *United States* v. *Community Services, Inc., supra,* cited by petitioner, the court stated the correct rule that tax exemptions are matters of legislative grace which must be strictly construed against the taxpayer, citing several decisions of this Court. This rule is well established with respect to District of Columbia tax laws, which petitioner has ignored. See *Hebrew Home for the Aged* v. *District of Columbia*, 79 U. S. App. D. C. 64, 142 F. 2d 573. In any event the lower court did not discuss this question.

CONCLUSION

It is submitted that the petition for writ of certiorari should be denied.

Respectfully,

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